The Central Law Journal.

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CURRENT TOPICS.

In the case of Fox v. Hall, printed in our last week's issue, the Supreme Court of Missouri announces the doctrine that, where one takes a title to land by quit-claim, which in the hands of the grantee is subject to equities, to which the recording act does not apply, the grantee by quit-claim will take the land subject to such equities; but that the grantee for value in a quit-claim deed acquires, as against an unrecorded deed of which he had no actual notice, the rights of a *bona fide* innocent purchaser. In a well-considered and exhaustive article on the "Nature and Effect of a Quit-Claim Deed" (12 Cent. L. J. 127), by W. B. Martindale, the position is taken, (and, as we think, it is conclusively shown to be the only sound principle upon which these cases can be made to rest), that the form of the deed gives notice of the existence of prior rights in others. This being the case, it is difficult to see, as there suggested, how the recording acts can be construed to protect a purchase by quit-claim, as such acts have been uniformly held to be intended for the protection of *bona fide* purchasers for value without notice. If the form of the deed gives notice of prior equities in the case where such equities are not within the purview of the recording acts, we can perceive no reason why it should not be held to give notice in the other as well. A purchaser by quit-claim is not *per se* chargeable with notice. The discussion of this subject in Chapman v. Sims, 53 Miss. 154 leads irresistibly to this conclusion.

The Boston *Herald*, speaking of the resolutions which we printed last week, says: "The most sensible plan we have seen for the relief of the Supreme Court of the United States is that of the Missouri Bar Association." Coming from the Hub of the Universe, this utterance is worthy of note as an unaccustomed recognition of humble Western merit.

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In view of inquiries made for the printed proceedings of the recent annual meeting of the State Bar Association, we are informed by President Hitchcock that the Executive Committee are diligently preparing the same for the press, and that it will very soon be published and distributed to the members. The *impromptu* organization a year ago at Kansas City, and the failure of many of the members subsequently to sign the roll, caused some embarrassment in making a perfect list. This was remedied as far as possible at the recent meeting, and the roll of members is now as complete as the committee can make it. We are gratified to learn that it numbers nearly three hundred names, from all parts of the State. It is still possible that some names have been inadvertently omitted, which should appear in the official list, and we are requested to urge upon every member of the State Bar, entitled to membership, who has not made sure that his name is on the roll, to immediately address either the President, Henry Hitchcock, Esq., or James E. Withrow, Esq., the Chairman of the Executive Committee (both residing in this city), stating the facts which entitle him to be enrolled.

The interest and pleasure expressed on all sides at the success of the recent annual meeting, and the energy with which the executive committee for this year have taken hold of their duties, give the strongest reason to believe that this association has entered upon a career which promises great usefulness.

We have received an account of the recent proceedings of the Alabama State Bar Association. The general tenor of their discussion is Judicial Reform, which seems to be the *raison d' etre* and proper avocation of such a body.

The Tennesse Bar, too, have recently been engaged in the good work of organizing a State bar association. The rapid development of these organizations in every part of the country, is a most encouraging sign of progress. The advantages which are likely to grow out of progressive measures by organized bodies of lawyers are, we think, inestimable.

EQUITABLE LIENS UPON PERSONAL PROPERTY.

A common-law lien is a right to retain possession of property belonging to another, until a claim of the party in possession, against the owner, is satisfied.[1] Such are the liens of workmen, on property upon which they have performed service; of pawners upon their pawns; of innkeepers upon goods of their guests, and of carriers upon property conveyed by them from place to place.[2] These, and other liens at common law, are inseparable from possession, and are lost if it is surrendered.

Equity begins where the law leaves off, and allows liens without reference to possession, which have no existence at law.

An equitable lien may be defined to be a right not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part, to the payment of a particular debt or class of debts.[3]

Such liens are founded either upon express contract or the abstract principles of justice.

They are upheld against all the world, except *bona fide* mortgagees or vendees without notice.[4] They are usually enforced, when upon chattels, by a sale of the property to which they are attached.[5]

The term "equitable lien" is only applicable, strictly speaking, to those liens which only exist in equity;[6] but certain liens are recognized by courts of equity which are not strictly equitable; thus, the liens of solicitors for fees and disbursements, though protected at law, are also recognized in equity.[7]

A solicitor, or attorney, is entitled to a lien in the following cases: 1. Where books or papers are placed in his hands by a client, he is entitled to a lien thereon for his general balance.[8] 2. Where he has money in his hands which he has collected by suit for a client, he has a lien thereon for his disbursements, and reasonable or agreed fees for his services in the case; and he may enforce his lien by deducting the amount so due him from the fund in his possession; but he has no lien in such cases for his general balance.[9]

3. In those States in which fees are taxable as costs, he has a lien therefor, and for his disbursements, upon any judgment recovered through his exertions; and upon any fund paid by the judgment debtor into court.[10] Whether a solicitor is entitled to a lien for disbursements, and his agreed or *quantum meruit* fees, where under the laws of the State his costs are not taxed, or where his client has agreed to pay him a certain compensation for his services, in addition to his taxable fees, is, as yet, not well settled. Justice and the general principles of equity would seem to require that a lien should be allowed in such cases; and so the courts of New York, Georgia, Florida and Arkansas have decided.[11] The Supreme Court of Missouri has held, however, in the case of Frissell v. Haile,[12] that attorneys have no lien upon judgments, except where their fees are taxable as costs. And Humphrey v. Browning,[13] Hill v. Brinkley,[14] and Wright v. Ellison,[15] are to the same effect.

Equitable liens are very frequently allowed upon the principle that equity looks upon that as done which ought to be done. Thus, though at law a factor can only claim a lien for advances upon property in his possession, he is, in equity, allowed a lien upon goods which the owner has agreed to consign to him, if he has made advances upon the credit of the consignment, though the agreement is broken and the goods never came into his

1 2 Abbott's Law Dic., 44; Bis. Prin. Eq., sec. 351
2 Edwards on Bailments, secs. 420, 245, 473, 645; Story on Bailments, secs. 440, 303; 466, 588, 604.
3 Gladstone v. Berley, 2 Meriv. 403; *Ex parte* Foster, 145; 2 Story's Eq. Jur., sec. 1215.
4 Story's Eq. Jur., sec. 1217.
5 2 Story's Eq. Jur., sec. 1217, *et seq.*; Neate v. Duke of Marlborough, 3 Myine & Craig. 437.
6 Bis. Prin. Eq., sec. 351; 2 Story's Eq. Jur., sec. 1215.
7 Stewart v. Flowers, 44 Miss. 513.
8 Spenc. Eq. Jur., 799; Mitchell v. Oldfield, 4 Term R. 125; Blunden v. Desart, 4 Myl. & Craig. 253; Rankil v. Huntington, 5 Day, 163; Stewart v. Flowers, 44 Miss. 513.
9 Hugh v. Edwards, 37 Eng. Law & Eq., 470; *In re* Paschal, 10 Wall. 483; Read v. Bostick, 6 Hun, 321; Harney v. Demes, 3 How. 175; Pope v. Armstrong, 3 S. & M. 244; McDonald v. Napier, 14 Ga. 89.
10 *Ex parte* Cleland, 2 Ch. App. 808; Shipley v. Brenows, 4 N. H. 347; Willis v. Hatch, 43 N. H. 247; *Ex parte* Kyle, 1 Cal. 331; Foot v. Tewksbury, 2 Vt. 97; Baker v. St. Quinlin, 12 M. & W. 440; Turner v. Gibson, 3 Atk. 719; 2 Story's Eq. Jur., sec. 1233.
11 Hall v. Ayer, 19 How. Pr. 91; Rooney v. Second Bank, 18 N. Y. 368; McDonald v. Napier, 14 Ga. 89; Carter v. Davis, 8 Fla. 183; Hanger v. Fowler, 20 Ark. 667; Sexton v. Pike, 13 Id. 193.
12 8 Mo. 18.
13 46 Ill. 476.
14 10 Ind. 102.
15 1 Wall. 16.

hands; and in such cases, if the goods agreed to be consigned are disposed of by the owner to a *bona fide* purchaser, the factor has an equitable lien upon the proceeds of the sale.[16] On the other hand, where goods are consigned to a factor for sale, the owner has an equitable lien upon the proceeds, subject only to the factor's lien for charges and advances.[17] The maxim that equity looks upon that as done which ought to be done, was also acted upon in the case of Reed v. Gaillard.[18] That case was one in which a promissory note had been loaned to a party who agreed to give the lender a bill of sale of certain personal property as security, but died without doing so. The lender having had to take up his note, was held entitled to an equitable lien upon the property of which the bill of sale had been promised. So, where a debtor agreed, for a valuable consideratiion, to give a creditor a mortgage upon certain slaves, if his claim was not satisfied out of other securities within a specified time, it was held that the agreement entitled the creditor to an equitable lien upon the slaves, in case the other securities should prove insufficient to satisfy his demands, although the mortgage was never executed.[19] A somewhat similar case was that of Payne v. Wilson,[20] in which it appeared that the defendant had given the plaintiff an instrument intended to operate as a mortgage upon certain personal property, but which was so defectively drawn up as to be inoperative as such. The court held that the intention of the parties should govern, and decreed that the plaintiff was entitled to an equitable lien upon the property attempted to be mortgaged.

As a general rule, in the absence of any interfering statute, an equitable lien will be decreed wherever a debtor has, in good faith, contracted with a creditor, that the latter shall have a lien upon specified property as security for a debt, if the agreement does not operate to create a lien at law. Thus, where it was agreed in writing that certain logs should be holden to a party performing work thereon, until the amount due the latter for his services was paid, or satisfactory security given, and it was understood that the logs should not remain in the possession of the party performing the labor, and possession was accordingly surrendered to the owner without his paying for said services, or giving any other security, it was held that the party who rendered the services was entitled to an equitable lien upon the logs for the amount due him. In all such cases, equity will disregard technicalities and go very far to enforce contracts. Thus, though at law many technical and wordy reasons are discovered why an agreement to allow a creditor a lien upon a thing, not yet in existence, can not be of any effect, equity finds no difficulty in allowing such an agreement to operate to create a lien upon the thing in reference to which the contract is made, as soon as it comes into existence.[21] But a mere promise by a debtor to pay a debt out of a particular fund due him, as soon as he receives it, will not operate to give his creditor a lien upon the fund.[22] To have that effect, the promise must amount to an equitable assignment; and an agreement, to operate as an assignment, must distinctly appropriate the fund, or a part of it, to the payment of the creditor's claim.[23] The case of Taylor's Exr's v. Gibbs[24] was one in which there was such an appropriation. A due-bill had been given to Taylor, with the understanding that certain notes belonging to the defendant should be placed in an attorney's hands for collection, and that the attorney should be instructed to pay the due-bill out of the proceeds. The notes were placed in the attorney's hands accordingly, with the instructions agreed upon, and he collected a certain sum thereon. Upon that sum the plaintiff claimed a lien for the amount of the due-bill, and his claim was allowed. So, where A agreed with B to have certain goods sold by his agent, and the proceeds accounted for to B, in order that the

16 Colesworth v. Stephens, 4 Hare, 185.
17 *Ex parte* Alston, 4 Eng. Ch. App. 168; Broadbent v. Barlow, 4 De G. F. & J. 570.
18 2 Desaussure, S. C. 552.
19 Dow v. Kerr, 1 Speer's Eq. Rep. (S. C.) 413.
20 74 N. Y. 348.
21 Kirksey v. Means, 42 Ala. 426; Maulden v. Annestead, 18 Ala. 500; Dow v. Kerr, 1 Speer's Eq. Rep. (S, C.) 413; Wilson v. Wilson, 4 Eq. Cas. 32; Russell v. Haddock, 8 Ill. 232; Roundell v. Breary, 2 Vern. 482; Power v. Bailey, 1 Ball. & Beal, 49; Story's Eq. Jur., sec. 1040, *et seq.*
22 Roderick v. Grandill, 1 De G. M. & G. 763; Burn v. Carvalho, 4 Myl. & Craig. 690; Ford v. Garner, 15 Ind. 298.
23 Wright v. Ellison, 1 Wall. 16.
24 3 B. Mon. 316.

latter might apply them upon a debt which A owed him, and the goods were accordingly sold, it was held that B had an equitable lien on the proceeds of the sale.[25]

That the assignment of part of a *chose* in action will give the assignee an equitable lien upon the debt, if the debtor consents to the assignment, is too well settled to require a citation of cases.[26] The authorities are at variance, however, as to whether or not the debtor's consent is necessary. In the case of Mandeville v. Welch[27] in which Mr. Justice Story delivered the opinion, it was held that a creditor could not be permitted to split up a single cause of action by assigning part of the debt without the debtor's consent, since it might subject the latter to several suits, and responsibilities not contemplated in his original contract. Mandeville v. Welch, has been followed in Missouri in Rose v. Fairfield,[28] and Burnett v. Crandall.[29] The former case was at law. The latter was in equity, and was one in which a portion of a judgment was assigned without the debtor's consent. The court held, in deciding it, that whatever equities or rights arose, or were created, between the assignee and assignor, the assignment could have no obligatory force on the judgment debtor, and that he was at liberty, after receiving notice of the assignment, to pay the original judgment creditor the whole amount recovered.

On the other hand, the soundness of the rule laid down in Mandeville v. Welch, is questioned by text-writers.[30] Story, in his work on Equity Jurisprudence, states, without any qualification, that the debtor's assent is unnecessary, and this seems to be the true doctrine,[31] although the weight of authority is, perhaps, the other way. With the exception of Field v. Mayor, the cases, cited by Story on this point, do not bear out his text. Where such partial assignments have been declared of no effect as against debtors, it has been upon the ground that, if they were upheld, debtors might be subjected to a multitude of suits for the same cause of action, and where that result can not follow, and no second claim for the demand can be made, the debtor's assent to the assignment is not required.[32] But whatever may be the true rule in regard to the necessity of obtaining the debtor's consent where a partial assignment of a *chose* in action is made, it is at any rate necessary for the assignee to give him notice of the assignment, in order to perfect the lien thereby created as against subsequent assignees for value; and the assignee, who first gives notice to the debtor, is, as a general rule, held to have the prior right.[33]

A very important equitable lien is that possessed by partners upon firm property. Each partner is entitled, as against separate creditors and his copartners, to a lien on the partnership property for the purpose of having it applied in discharge of the debts of the partnership, and a lien upon the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm;[34] but partners have no lien upon property bought with their consent by a copartner for his own use with partnership funds;[35] nor are they entitled to any lien upon partnership property as security for money loaned by them to a copartner without reference to the partnership.[36] But where a member of a firm, without the consent of his copartners, assigns partnership property to secure or pay an individual debt, the lien of his copartners is not divested, even though the assignee is ignorant of the fact that the property belongs to the firm.[37] The lien of the partners survives after the dissolution of the firm by the death of a member, and the share

[25] Weymouth v. Boyer, 1 Ves. 416. To the same effect see, Michigan State Bank v. Gardner, 15 Gray, 562.

[26] Story's Eq. Jur. sec. 1044; Rose v. Dawson, I. H. & W., Ld. Cas. in Eq. 612.

[27] 5 Wheat. 277.

[28] 13 Mo. 301.

[29] 60 Id. 410,

[30] Bisph. Prin. Eq., sec. 166.

[31] Field v. Mayor, ett., 6 N Y. 179; Cook v. Ins. Co., 8 How. Pr. 514; 2 Story's Eq. Jur., § 1044,

[32] Beardslee v. Albin, 4 Mo. App. 139.

[33] Bisph. Prin. Eq., sec. 167; 2 Story's Eq. Jur., sec. 1035.

[34] 2 Lindley on Partnership, 679 *et seq.*; Collyer on Partnership, sec. 125, *et seq.*; 2 Story's Eq. Jur., sec. 1243; Pierce v. Wilson, 2 Ia. 20; Warren v. Taylor, 6 Ala. 218; Crooker v. Crooker, 46 Me. 250; Menah v. Whitwell, 52 N. Y. 146.

[35] Cabaniss v. Clark's Adm'r., 31 Miss. 423; McCormick v. McCormick, 7 Neb. 440.

[36] Craven v. Knight, 2 Ch. R. 226; Richardson v. Goodwin, 2 Vern. 293; Croft v. Pike, 13 P. Wms. 180.

[37] Young v. Keighly, 13 Ves. 557; Ackley v. Staehlin, 56 Mo. 558; Price v. Hunt, 59 Id. 238; Hilliker v. Francisco, 65 Id. 598.

of the deceased partner goes to his executor, subject thereto.[38] The lien of the partners is divested by a *bona fide* sale in the course of the partnership business, or a distribution of the property among the partners.[39]

Firm creditors have no independent lien upon firm assets, but only a *quasi* lien, or right to have the equities of the partners enforced on their behalf, when they have exhausted their legal remedies.[40] And on that theory, in the case of Allen v. Center Valley Co.,[41] where an insolvent firm had disposed of firm assets, and the members had divided the proceeds among themselves, to be retained by them as their separate property, it was held that the firm creditors lost their right of priority over separate creditors as to the proceeds of such sale. And it has been held, that where a firm is composed of two partners, and one of them makes a *bona fide* sale of his share of the partnership assets to the other, the joint creditors lose their lien, or right of priority;[42] even though, at the time of the sale, the firm is insolvent, if the partners are ignorant of their insolvency.[43] But where one member of the firm buys out the others, knowing the firm to be insolvent, the rights of the joint creditors are not affected.[44]

Creditors of a corporation have a lien upon its assets, which corresponds to the so-called *quasi* lien of firm creditors upon firm assets. The lien is upheld as against all the world, except *bona fide* purchasers for value.[45]

Upon the same principle, the creditors of a deceased individual are entitled to a lien upon his property as against legatees and distributees.[46]

The principles upon which equitable liens are allowed, are also extended so as to protect trust funds; and where such funds are diverted by a trustee, equity will give the *cestui que trust* a lien upon the property in which they are invested, as against the trustee, his creditors, and vendees with notice.[47]

There are other important equitable liens, among them those created by mortgages; but, owing to a lack of space, they can not be discussed in this article. BENJ. F. REX.

St. Louis, Mo.

[38] Story's Eq. Jur., 129.

[39] Allen v. Center Valley Co., 21 Conn. 130; Pfirrman v. Koch, 1 Conn. 460; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3; *Ex parte* Rowlandson, 2 Ves. & Beav. 172.

[40] Bisph. Prin. Eq., sec. 520; Story's Eq. Jur., sec. 1253; Seabrook v. Rose, 2 Hill Ch. 253; Allen v. Center Valley Co., 21 Conn. 130; Rainey v. Nance, 54 Ill. 29; Harman v. Clark, 13 Gray, 114; Pferrmnn v. Clark, 1 Conn. 460; Commercial Bank v. Wilkins, 9 Gilf. 28; Freeman v. Stewart, 41 Miss. 138.

[41] 21 Conn., 130.

[42] *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3; *Ex parte* Rowlandson, 2 Ves. & Beav. 172.

[43] Pferrman v. Koch, 1 Conn. 469.

[44] Phelps v. McNeely, 66 Mo. 354; Tenney v. Johnson, 43 N. H. 144; Menagh v. Whitwell, 52 N. Y. 146.

[45] Wood v. Dunmore, 3 Mason, 308; Curran v. State, 15 How. 312; Story's Eq. Jur., sec. 1252; Field on Corp., sec. 492.

[46] 2 Story's Eq. Jur., sec. 1251.

[47] Harlford v. Loyd, 20 Beav. 310; Ernest v. Croysdill, 6 Jur. (N. S.) 740.

LIMITING THE TIME OF ARGUMENT OF COUNSEL.

There is no question but that there should be a limit to the time allowed counsel in making an address to the jury. There is always some power vested in the courts to circumscribe the time for summing up the case to the jury. But at the same time, this power, lodged in the court, must in some way be abridged, else it may be exercised disastrously to the principles of justice. It is the practice at the present time in many civil cases, and a few minor trials for crimes, for the court to limit the time of argument with the consent of counsel on both sides, and in this the court is always sustained. [1]

This power should be exercised with great care, and the question should be, whether complete justice may be done or not. For instance, in a slander case, where the court limited the counsel for the plaintiff to one hour and a half, and the counsel for the defendant to one hour and a half, it was held it was no abuse of the discretion of the court. [2]

It is the constitutional right of every citizen to have counsel, and to be allowed the privilege of having him address the jury, as was stated in an Ohio decision, where the ac-

[1] Dobbins v. Oswalt, 20 Ark. 619; Freligh v. Ames, 31 Mo. 253; State v. Page, 21 Mo. 257; Lynch v. State, 9 Ind, 541.

[2] Musselman v. Pratt, 44 Ind. 126.

cused was on trial for shooting with an intent to kill, and the counsel for the accused was allowed an address of five hours, which was sustained on appeal. [3]

Again, in a case where the defendant was on trial for an attempt to murder, and the court limited the argument of counsel for the defense to forty minutes, it was held error thus to limit him under his protest that he could not do justice to his client in that short space of time.[4] It was substantially held in California, where the prisoner was on trial for a capital offense, and his counsel was limited in summing up to one hour and a half, that such a ruling deprived him of that full defense, which was his natural right.[5]

It is somewhat difficult to reconcile these cases with one in North Carolina, where the accused was tried for murder, and it was held no error to restrict his counsel to one hour and a half.[6]

In many States it is somewhat regulated by court rules. Thus Circuit Court rule 63, of Michigan, provides that no more than two hours shall be allowed to either side for the summing up of a cause, unless the court shall otherwise order, and the same is substantially true in New York.

The general summary of the subject then is, that although a wide discretion is left to the court in the matter of the time of argument, it may be so abused as to make it necessary to reverse the case on appeal or to allow a new trial, and it often becomes material to the defense, whether sufficient time has been allowed in summing up to permit justice to be done.

A. G. McKean.

Ann Arbor, Mich.

[3] Weaver v. State, 24 Ohio St. 584.
[4] Hunt v. State, 49 Ga. 255.
[5] People v. Keenan, 13 Cal. 581.
[6] State v. Collins, 70 N. C. 241.

NEGOTIABLE PAPER — INDORSEMENT IN BLANK—PAROL EVIDENCE.

MARTIN v. COLE.

Supreme Court of the United States, October Term, 1881.

1. An indorsement in blank of a negotiable promissory note is a complete commercial contract, and not in any sense an implied contract. Consequently, evidence of a parol agreement between the parties at the time that it should merely have the effect of an indorsement "without recourse," is inadmissible.

2. Where the maker of a note is insolvent, a failure on the part of an indorsee to prosecute it to judgment against him, will not prejudice his claim against the indorser.

In error to the Supreme Court of Colorado Territory.

Mr. Justice Matthews delivered the opinion of the court:

This cause is brought into this court by a writ of error to the Supreme Court of the Territory of Colorado.

The defendant in error was plaintiff below, and brought his action of *assumpsit* against the plaintiff in error, as indorser of a promissory note, in the District Court of the First Judicial District of Colorado Territory, for the County of Arrapahoe, the plaintiff below being the immediate indorsee.

A copy of the note sued on, with the indorsements, filed with the declarations, is as follows:

"$1,414.15.

Georgetown, C. T., July 17th, 1868.

"On or before eighteen months after date, I promise to pay to John H. Martin, or order, the sum of fourteen hundred and fourteen 15-100th dollars, for value received, at George I. Clark & Co.'s bank at Georgetown, with interest at the rate of three per cent. per month from date until paid.

(Signed) John Webb."

[Indorsed on back.]

"Pay to the order of Luther A. Cole. Value received.

"(Signed) John H. Martin."

The declaration, besides the common money counts, contained five special counts.

In the first of them it is averred that the note sued on being unpaid, on February 5, 1870, the plaintiff instituted suit thereon against the maker, at the first term of the court in the county of his residence after the maturity thereof, and at the same term, on April 7, 1870, recovered judgment thereon against him for $2,284, together with costs; that, upon said judgment, he afterwards, on May 9th, 1870, caused to be issued, and placed in the hands of a sheriff, an execution, which, on June 1, 1870, he had sold according to law for the sum of five dollars, besides the costs of the suit, amounting to $45.75; and it is also in the same count further averred that, from the time of the rendition of the judgment against Webb, the maker of the note, he had no other property,

either real or personal, subject to execution, out of which the balance of the judgment or any part of it could have been made, and that the keeping of the execution in the hands of the sheriff for the period of ninety days from its date, or the issuing of a *pluries* or other execution to collect the balance of said judgment, would have been wholly unavailing. There is also the further averment in the same count that the plaintiff used all due diligence to collect said note from the maker.

The second count of the declaration contains the averment that "at the time the said note became due and payable, and from that time up to the time of the commencement of this suit, and up to the present time, the said John Webb ever has been, and still is, insolvent and unable to pay said note, and that the institution of a suit against the said John Webb at the time the said note became due, or at any time from the maturity of the said note until the present time, would have been, and was, and would be, entirely unavailing," etc.

These averments appear to have been made with a view to meet the requirements of section 7 of an act, then in force, of the Territory of Colorado, relating to bonds, bills, and promissory notes, which is referred to in the brief of one of the counsel, as found on page 85 of the Revised Statutes of Colorado of 1868, but which, in disregard of the rules of this court, is not set out either in the record of the case or the brief of counsel. The volume referred to not being accessible, we find what we assume to be a republication of the same provision in the General Laws of the State of Colorado, published by authority in the year 1877. It is as follows:

"Sec. 7. Every assignor, or his heirs, executors, or administrators, of every such note, bond, bill, or other instrument in writing, shall be liable to the action of the assignee thereof, or his executors or administrators, if such assignee shall have acted with diligence, by the institution and prosecution of a suit against the maker of such assigned note, bond, bill, or other instrument of writing, or against his heirs, executors, or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof; *provided*, that if the institution of such suit would have been unavailing, or if the maker had absconded or left the State, when such assigned note, bond, bill, or other instrument in writing became due, such assignee, or his executors or administrators, may recover against the assignor, or against his executors or administrators, as if due diligence by suit had been used."

The plaintiff in error, defendant below, in addition to the general issue, filed a special plea to the first and second counts of the declaration, the substance of which is as follows:

"And the defendant avers that he made the said indorsement, when it was so made, in blank, that is to say, by writing his name across the back of said promissory note, and that he made said indorsement with the express agreement by and between him and the said plaintiff, the said Luther A. Cole, that the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary. And this defendant avers that, relying upon the assurance of the said plaintiff that his indorsement should not be filled up so as to render him liable as indorsee thereon, he signed his name upon the back of said note, which, without said assurance, he would not have done."

To this plea there was filed a general demurrer, which was sustained.

Afterwards, on June 6, 1874, the cause was submitted, by consent of parties, without the intervention of a jury, when the court found the issues in favor of the plaintiff and rendered judgment against the defendant for $2,478.17, damages and costs.

A bill of exceptions was taken, which sets out all the evidence given and offered in the trial of the case. From that it appears that the defendant below, Martin, being on the stand as a witness in his own behalf, was asked to state under what circumstances the note in suit was transferred by him to the plaintiff, Cole. Objection being interposed, the defendant then stated to the court that he offered to prove in defense a parol promise contemporaneous with the indorsement of the note; that he proposed to prove by the witness that the parol agreement set forth and stated in the defendant's second plea was made by the parties. The court sustained the objection and the defendant excepted.

Thereupon the defendant offered to prove that at the time the note was transferred by Martin to Cole, it was expressly agreed between them that Martin should indorse his name on the note in blank to enable Cole to collect in his own name; and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note; to which offer an objection, interposed by the plaintiff, was sustained, and the defendant excepted.

The defendant had previously testified that his name on the back of the note was written by him, but that the words "Pay to the order of Luther A. Cole, value rec'd," were not written at the time of the indorsement and delivery of the note, nor by him at any time.

The plaintiff below read in evidence the depositions of William L. Campbell, Levi H. Shepperd and John T. Harris, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity. Objections were made to their depositions and overruled; to which an exception was taken. The objections, however, do not appear to be of sufficient importance to require further notice.

The plaintiff also read in evidence the transcript

of the record, judgment and proceedings in the action of Luther A. Cole against John Webb, the maker of the note, together with the execution, levy and return, being the same referred to in the first count of the declaration. From that it appears that the execution was issued on May 9, 1870, returnable in ninety days from date, and actually returned on June 7, 1870, showing the levy and sale referred to in the pleadings.

There was other testimony, also, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity, and at the time of the bringing of this action.

An appeal was taken from the judgment of the district court of the First Judicial District of the County of Arrapahoe to the Supreme Court of Colorado Territory, in which, at the February term, 1875, errors were assigned, and the judgment was affirmed in that court on March 28, 1876.

To reverse that judgment is the object of the present writ of error.

The agreement set out and relied on, in the plea, was, that "the said indorsement should never be filled up so as to make the defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary." And the defendant averred that "he, relying upon the assurance of the said plaintiff, that his indorsement would not be filled up, so as to render him liable as indorser thereon, signed his name upon the back of said note, which, without said assurance, he would not have done." As the indorsement in blank, admitted by the defendant to have been made by him, without being filled up by the plaintiff at all, rendered him liable for the payment of the note, as an indorser, the breach by the plaintiff of the alleged agreement was inconsequential, and could not, in law, result in any actionable injury; for filling up the blank indorsement, in the manner in which it was done, neither added to, nor subtracted from, the liability which the defendant assumed by merely writing his name on the back of the note.

The defendant below, however, further offered at the trial to prove that, at the time the note was transferred by Martin to Cole, it was expressly agreed between them that Martin should indorse his name on the note in blank, to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note. No question was made at the time, nor has been raised since, as to the admissibility of such proof, under a plea of the general issue; and waiving any objection on that account, the rejection by the court below of this offer, fairly raises the issue intended to have been made by the special plea, whether it is competent, in an action against an indorser by his immediate indorsee, upon an indorsement made in blank of a negotiable promissory note, to prove, as a defense, that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse.

It has never been contended that such a defense, based on dealings between prior parties, could be maintained to defeat the title of a *bona fide* holder for value of negotiable paper, acquired before maturity, in the usual course of business, and without notice; for the protection of such a title is of the essence of the policy of the law-merchant, and inheres in the very definition of negotiability. Hence, in that case, a collateral, but contemporaneous written agreement, between two prior parties to a bill or note, would not affect its validity in the hands of the holder, more than if the agreement were unwritten. Whereas, between the immediate parties, if the agreement relied on were in writing, its terms would fix and determine their rights and obligations, as was decided by this court in Davis v. Brown, 94 U. S. 427. The question is between them alone; and is, whether the same effect will be given to such an agreement, not reduced to writing.

The ground of the decision must be found in some other principle or policy of the law than that which protects the title of a remote innocent holder of negotiable paper.

Accordingly, Mr. Justice Washington, in the case of the Susquehanna Bridge and Bank Company v. Evans, 4 Wash. C. C. 480, after admitting proof of such an agreement, in an action by the holder of a promissory note against his immediate indorser, said, in his charge to the jury:

"The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was, therefore, properly admitted."

It is upon this distinction between contracts, express and implied, that those judicial tribunals have proceeded, in which such proof is held to be admissible. It is declared, for example, by the Supreme Court of Pennsylvania, in the case of Ross v. Espy, 66. Pa. St. 483, that "the contract of indorsement is one *implied* by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an *express* agreement."

So, in an early case in New Jersey—Johnson v. Martinus, 4 Halst. 144—it was held by the Supreme Court of that State that parol evidence was competent to overcome the implied contract which results from a blank indorsement, on the ground that such indorsement is an inchoate or imperfect contract and not a written instrument, nor entitled to its effect, protection or immunity.

This case, however, was expreslly overruled by the same court in the case of Chaddock v. Vanness, 35 N. J. L. 517, in which it is plainly indicated that the distinction attempted to be made, in some of the cases, between indorsements in full and those which are in blank, is untenable.

The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not, in any proper sense, a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less, on that account, perfectly understood. All its terms are certain, fixed and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention, as fully and completely as if he had written out the customary obligation of his contract in full.

It is spoken of by Wharton (Law of Evidence, etc., sec. 1059) as a contract at short-hand. The same view is taken in Daniels on Negotiable Instruments, sec. 718, where the author states, as a resulting conclusion that embodies the true principle applicable to the subject, that, "in an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer, against him." If the commercial contract of indorsement is treated as a contract in writing, this conclusion is undoubtedly correct. If it is not, we have the anomaly of applying one rule between maker and payee, and a different one between payee becoming indorser and his immediate indorsee, without any difference to justify it, in the relation of the parties to each other in the two cases.

The rule is tersely stated in Benjamin's Chalmer's Digest of the Law of Bills of Exchange, etc., art. 56, p. 63.

"The contracts on a bill, as interpreted by the law-merchant, are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect." Citing Abrey v. Crux, 5 L. R. C. P. 37.

The rule, as declared by Mr. Justice Washington in the case cited, was expressly rejected by this court in the case of Bank of the United States v. Dunn, 6 Pet. 51, one distinct ground of its opinion being that parol evidence is not admissible to vary a written agreement, citing the language of the court in Renner v. Bank of Columbia, 9 Wheat. 587: "For there is no rule of law better settled or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement."

The authority of this case on this point has never been questioned in this court, the explanation and qualification in Davis v. Brown, 94 U. S. 423, having reference only to the rule as to the competency of an indorser as a witness to impeach the validity of a negotiable instrument to which he is a party. In the case last referred to, the agreement relied on to qualify the instrument was admitted, because it was in writing, and part of the transaction.

The case of Bank of the United States v. Dunn, *supra*, is cited as an authority upon the point in Phillips v. Preston, 5 How. 291, "because, in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports."

It is also referred to in terms and followed in the case of Brown v. Wiley, 20 How. 442. In deliveriug the opinion of the court in that case, Mr. Justice Grier used this language:

"When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule in the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our States, originating in hard cases, but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill the owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract, that it should not be presentable till a distant, uncertain or undefined period, tended to alter and vary, in a very material degree, its operation and effect. See Thompson v. Ketchum, 8 Johns. 192."

The action in this case, it is true, was between the payee and drawer, upon a bill of exchange; but the obligation on which it was founded, that the drawer would pay, in the event of non-acceptance by the drawee, notice of dishonor and protest, is one not actually expressed in terms in the bill itself, but imported by construction of law, as constituting the operation and effect of the contract.

In the case of Specht v. Howard, 16 Wall. 564, Mr. Justice Swayne, delivering the opinion of the court, quotes from Parsons on Notes and Bills, 591, that "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, can not be permitted to vary, qualify, or contradict, to add to or subtract from the absolute terms of the written contract."

The same quotation forms part of the opinion in the case of Forsythe v. Kimball, 91 U. S. 291, with the addition, that in the absence of fraud, accident, or mistake, the rule is the same in equity as at law.

The same principle, upon the authority of these cases, was affirmed by this court in Brown v. Spofford, 95 U. S. 474, and is assumed to be the law in Cox v. National Bank, 100 U. S. 713, and Brent v. Bank of the Metropolis, 1 Pet. 89.

In view of this line of decisions, the question, as it arises in this case, can not now be considered an open one in this court.

It coincides with the rule adopted and applied in most of the States, but the cases are too numerous for citation. They will be found collected, however, in Bigelow's Bills and Notes, 168; Byles on Bills (6th Am. ed.), Sharwood's Note, 157; 1 Daniel on Negotiable Instruments, sec. 80, sec. 717, *et seq.*; 2 Wharton on Evidence, sec. 1,058, *et seq.*; Benjamin's Chalmer's Digest of the Law of Bills of Exchange, art. 56, p. 63.

Of course, there are many distinctions which, upon the circumstances of cases, determine the applicability of the rule, and classes of cases which form apparent exceptions to it. It is not necessary to refer to them here, further than to say that the limitations of the rule are perfectly consistent with it, and its application in this, as in other proper cases, will not be considered as encroaching upon them.

The opinion of the Supreme Court of Colorado Territory, affirming the judgment of the district court, expressly declines to pass upon the question whether the evidence showed that the property of Webb, the maker of the note, was exhausted or not, because no exception was taken to the finding and judgment of the court. Our attention is called by counsel to a stipulation, filed in the Supreme Court of Colorado, by which the omission to insert the exception agreed to have been taken at the time, in the bill of exceptions, was intended to be cured, which, it seems, could not have come to the knowledge of that court. But the consideration of the exception does not avail the plaintiff in error. The record shows abundant evidence to sustain the finding complained of. Even if the point made were well taken that where, under the statute of Colorado requiring a prosecution of the maker to the end of an execution, it is necessary that the execution should be kept in force for the full period given by law for its return, in order to establish due diligence, nevertheless, in the present record, there is shown, in our opinion, evidence to justify a finding in favor of the plaintiff below, even although no execution had been issued against the maker of the note. It clearly appears that it would have been unavailing on account of his insolvency. In Wells v. Claflin, 92 U. S. 135, under a statute of Illinois, containing a provision identical with that in the Colorado statute, from which, indeed, the latter is said to have been copied, it was held that if the maker of the note was insolvent, so that a suit against him would be unavailing, the failure to institute it would furnish no defense to the indorser. That, indeed, is the plain language of the law itself.

We find no error in the record, and the judgment will be affirmed.

MASTER AND SERVANT — CONFLICTING INTERESTS — SERVANT'S DUTY — INJUNCTION.

GOWER v. ANDREW.

Supreme Court of California.

The relation of master and servant is such that the servant will be restrained, by injunction, from making use of the knowledge and information of his master's affairs, acquired in his service, to engage in a business enterprise (during the continuance of the contract of service) which will have a tendency to place him in a position of antagonism to the interests of his employer.

MYRICK, J., delivered the opinion of the court:

This is an appeal from an order refusing to grant an injunction. The facts, as presented by the pleadings and affidavits, are substantially as follows: The plaintiffs were warehousemen, and as such occupied certain premises as tenants of the defendant Hopkins. The defendant Andrew was their clerk or agent in and about the business, and had access to their books and papers, and had knowledge of the business and their customers. The lease under which plaintiffs held the premises, at a monthly rental of $400, was about to expire, viz., on the first of November, 1879. During some month or two prior to the expiration of the lease, plaintiffs were negotiating with Hopkins for a renewal of the lease at a reduced rental, but their minds had not met as to whether there would be a renewal. During the same time the defendant Andrew was, without the knowledge of plaintiffs, negotiating with Hopkins for a lease of the premises to himself and the defendant Ross. During such negotiations defendant Andrew, without authority from plaintiffs, told Hopkins that plaintiffs would probably give up the warehouse, and if so, he would take it at $450 per month. Hopkins, without receiving definite information from plaintiffs that they intended to surrender the premises, but believing that such would be the case, gave to the defendants Andrew and Ross a lease of the premises for four years, from November 1, 1879, at a monthly rental of $450. Andrew's object in obtaining the lease was to enter into the business of warehousing with Ross on their own account, and Andrew solicited from some of the customers of plaintiffs at the warehouse their storage business, stating that "he had become the lessee of the warehouse, because Gower & Gilman did

not want it any longer." During all this time Andrew was in the employ of plaintiffs. As soon, however, as they learned he had taken the lease, he was dismissed.

We think that the injunction should have been granted. The granting, or refusing to grant, an injunction is very much within the discretion of the court to which the application is made; and an appellate court will not interfere unless a right clearly appears to exist. We think, however, that the facts before us clearly show a case where the plaintiffs, if they shall finally substantiate those facts, will be entitled to relief. We understand it to be the duty of the employee to devote his entire acts, so far as his acts may affect the business of his employer, to the interest and service of the employer; that he can engage in no business detrimental to the business of his employer; and that he should in no case be permitted to do for his own benefit that which would have the effect of destroying the business to sustain and carry on which his services have been secured. An agent should not, any more than a trustee, adopt a course that will operate as an inducement to postpone the principal's interest to his own. An agent or sub-agent, who uses the information he has obtained in the course of his agency as a means of buying for himself, will be compelled to convey to the principal. 1 L. Cas. Eq. 91.

It may be said that Andrew was not the agent of plaintiffs, so far as concerns the obtaining a renewal of the lease; that he was not charged with the duty of obtaining a renewal; it must, however, be said that he was, by virtue of his employment, charged with the duty of furthering their interests, and with the duty of not using the information obtained by him as their employee to their detriment. It seems to us that if Andrew desired to engage in the same business as his employers, on his own account, a very plain and very proper course was open to him, viz., to state to them all the facts and ask them to determine whether they desired a renewal. By pursuing the course which he did, he gave to Hopkins an inducement not only to not give plaintiffs a renewal at a decreased rental, but also an inducement not to renew at the then rental; and he compelled plaintiffs to have an unknown competitor who based his action upon knowledge acquired by him while in their employ. We do not think that this is equity or good conscience.

The order refusing an injunction is reversed.

We concur: ROSS, J., MCKEE, J., MORRISON, C. J. We dissent: SHARPSTEIN, J., MCKINSTRY, J., THORNTON, J.

FOREIGN CORPORATIONS — SERVICE OF PROCESS—EFFECT.

MCNICHOL v. UNITED STATES MERCANTILE AGENCY.

Supreme Court of Missouri, October Term, 1881.

Compliance with the terms of section 3489 Revised Statutes 1879, authorizing the service of process upon foreign corporations, "having an office or place of business in this State, by delivering a copy of the writ and petition to any officer or agent of such corporation * * * * in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained," will have the same effect as to such corporation that personal service has as to an individual.

Appeal from the St. Louis Court of Appeals.

George M. Stewart, with whom were *Dyer & Ellis*, for appellant; *Hitchcock, Lubke & Player*, for respondent.

SHERWOOD, C. J., delivered the opinion of the court:

Action for libel published by defendant in St. Louis and elsewhere; plaintiff being resident in St. Louis. The petition, among other things, charged that "defendant is a corporation created and existing by virtue of the laws of New York, and has an office and place of business in St. Louis." Upon the filing of the petition a summons issued against defendants, and the sheriff's return upon the same is as follows:

"Executed this writ in the City of St. Louis, on the twenty-ninth day of January, 1880, by delivering a copy of the said writ and petition, as furnished by the clerk, to George M. Forster, agent of the United States Mercantile Reporting Agency, who was in its business office and had charge thereof at the time of said service. The president or other chief officer could not be found in the City of St. Louis.

"JOHN FINN, Sheriff.

"By W. N. BELT, Deputy."

The defendant pleaded to the jurisdiction of the court as follows: "And now comes defendant, and entering its appearance solely for the purposes of the plea, denies that the court has, or can have, any jurisdiction of defendant in this cause, and avers that defendant is a corporation incorporated under the laws of the State of New York; that defendant's chief office is not in this State; that it is not a resident corporation of this State, but is a foreign corporation, having its chief office out of this State; and that defendant has not any office in this State, or agent in charge of any office in this State, nor has it any agent in this State, nor has it ever had any agent or office in this State. And, further, that the facts set forth in the amended return of the sheriff upon the writ of summons herein are not true. Wherefore, defendant prays that the plea may be allowed, and the cause dismissed for the want of jurisdiction."

Plaintiff filed a motion to strike out this plea, but the motion was denied.

I. Section 3489 (Rev. Stat. 1879) which comes under discussion in the present instance, is as follows: "Section 3489 — Writ, how served on persons and corporations. A summons shall be executed, except as otherwise provided by law, either: First, by reading the writ to the defendant, and delivering to him a copy of the petition; or, second, by delivering to him a copy of the petition and writ; or, third, by leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years; or, [fourth, where defendant is a corporation or joint-stock company, organized under the laws of any other State or country, and having an office or doing business in this State, delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or, if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained]; or, fifth, where there are several defendants, by delivering to the defendants who shall be first summoned, a copy of the petition and writ, and to such as shall be subsequently summoned, a copy of the writ; or, by leaving such copy at the usual place of abode of the defendant, with some person of his family over the age of fifteen years," etc.

I have included in brackets the fourth subdivision of that section, to which special attention is requisite, as upon that plaintiff bottoms his claim that the service herein is valid.

Apart from that subdivision, which appears for the first time in the present revision, the section, save an amendment which struck out the word *white*, as it stood in the General Statutes of 1865, is the same as it was in 1855. 2 Rev. Stat. 1223, sec. 7.

Section seven, just cited, evidently provided only for service on individuals. The effect of such service upon individuals had been previously defined and declared in section 5 of the same chapter. (2 Rev. Stat. 1855, chap. 128, p. 1222.) This section corresponds with section 3487 of the present revision, and provides that "Every defendant, served with the summons fifteen days before the return day thereof, shall be bound to appear at the return term of the writ; and if such summons be served less than fifteen days, he shall be bound to appear at the term next after the return of the writ."

Section one of the same article (art. v.) provides how suits may be instituted, *i. e.*, by filing a petition, etc., and by the voluntary appearance of the adverse party, or in lack of such appearance, by suing out a writ of summons against the person, or attachment against the property of the defendant. This corresponds with section 3485 of the present revision.

The 4th and 6th sections of the same article of the laws of 1855, make provision that the original writ, in cases not otherwise provided for by law, shall be a summons; that is, shall be returnable on the first day of the next term thereafter, if such first day be within fifteen days thereafter, and if not then, made returnable on the first day of the second term, and that such writ shall command the officer to summon the defendant to appear in court, on the return day of the writ, to answer the petition of the plaintiff.

These provisions correspond with sections 3486 and 3488 of the present revision, and when service under such provisions is had upon an individual, a general judgment against the party served is authorized. The question then arises, did the legislature, by the introduction into section 3489 of the fourth subdivision aforesaid, intend that the service of a summons on a corporation, as provided for in that subdivision, should be followed by like legal effects and consequences, as would the like service upon an individual? In a word, that service of summons in one case should result in the same way as service in the other? If we apply to this case the familiar maxim "*noscitur a sociis*;" if we follow the rule laid down by Lord Bacon, that "*Copulatio verborum indicat acceptionem in eodem sensu*," there would seem to be but little room for doubt that the legislature, by coupling in the same section words which provide for service on an individual, with words which provide for service on a corporation, intended that the words thus employed should, from the very fact of the intimate connection of such words, be understood in the same sense, and have the same force and effect. And besides, long prior to the enactment of the fourth subdivision now being discussed, the meaning of the words in the different sections I have cited in respect to individuals, had, in consequence of repeated adjudications, acquired a fixed import. In such cases where judicial construction puts a certain meaning on the words of a statute, and the legislature, in a subsequent act, *in pari materia*, or as an amendment of the original act, uses the same words, there arises the presumption that the legislature used these words intending to express the meaning which it knew had been put on the same words before. Broome Leg. Max. 586, and cases cited. And aside from any judicial construction of a statute, the legislature must be presumed familiar with the ordinary results incident to, and attendant on, the service of the usual process on individuals; and where it amends and enlarges a section of the statute by adding thereto a clause providing for similar service on a corporation, it is difficult to conceive of any sound reason for believing that any other result was intended in the case of a corporation than in that of an individual. In further elucidation of the intention of the legislature in this behalf, it is proper to note the history of legislation in this State, respecting the service of process on corporations.

In 1855 the Revised Statutes provided that "any corporation incorporated by any other State o

country, and having property in this State, shall be liable to be sued, and the property of the same shall be subject to attachment in the same manner as individuals, residents of other States or countries, and having property, are now liable to be sued, and their property subject to be attached." 1 R. S., p. 375, sec. 22. In 1859 the legislature passed an act providing that all railroad companies who own and operate roads terminating opposite to the City of St. Louis, and whose chief office or place of business is in the City of St. Louis, shall be sued in the same manner, and no other, that railroad companies chartered by the laws of this State are now sued. Sess. Acts 1859, p. 67. The method there referred to for service on domestic railroad corporations, is that found in section 1, 1 R. S. 1 855, p. 376, as follows:

"In all actions which may be instituted against a corporation or incorporated company, it shall be sufficient to issue a summons commanding the corporation, by their corporate name, to appear to answer the action; which summons shall be directed, as provided by this section, and be returnable in like manner, and subject to the same rules and regulations as the like process in case of individuals."

The plain purpose of the amendment of 1859 was to place a railroad corporation, incorporated in another State, but having its chief office here, on the same plane as a domestic corporation, which, as above seen, was made suable in like manner, by the like process, and subject to the same rules and regulations as "in case of individuals." This provision of the general law (section 22, *supra*), respecting service on foreign corporations, and the amendment of 1859, respecting foreign railroad corporations, were considered in connection with each other; and it was held that, in consequence of the amendment above cited, a foreign railroad corporation, by reason of its having its chief office or place of business in St. Louis, was virtually a resident of this State, subject to ordinary process, and therefore there was no ground for the issuance of the extraordinary process of attachment. Farnsworth v. Railroad, 29 Mo. 75. In 1865 a revision of the statutes occurred, when section 22, *supra*, was blended with the act of 1859, thus: "Any corporation incorporated by any other State or country, and having property in this State, shall be liable to be sued, and the property of the same shall be subject to attachment, in the same manner as individuals, residents of other States or countries, and having property, are now liable to be sued and their property subject to be attached; *provided*, that all railroad companies who own and operate roads terminating opposite to the City of St. Louis, and whose chief office or place of business is in the City of St. Louis, shall be sued in the same manner, and no other, that railroad companies chartered by the laws of this State are now sued." The act of 1859 was also embodied in ch. 164 of the Revised Statutes of 1865, at sec. 2, which chapter related to the manner of commencing suits.

In 1871, the subject of serving process on foreign railroad corporations came up again for consideration, and this court held, in Robb v. Railroad, 47 Mo. 540, that the defendant therein could not, under the statute, be served by the ordinary process of summons; because under the terms of the statute, jurisdiction was made to depend on the fact that the corporation had its chief office or place of business located in St. Louis. The law remained as declared in the Robb's Case, until 1879, when, as if with the fixed design of establishing a rule different from that announced in that case, as well as in that of Middough v. Railroad, 51 Mo. 520, by a divided court, the legislature, leaving section 17 of chapter 62 of the General Statutes relating to corporations untouched, amended section 2 of chapter 164, which relates to the manner of commencing suits, by providing that, "All railroad corporations that own and operate roads terminating opposite to any point in this State, and which have offices or places of business in this State, shall be sued in the same manner as railroad corporations chartered by this State." Laws of 1877, p. 369.

Similar statutes, from time to time, have been passed by our legislature, prescribing the method of service on foreign insurance companies, and making such service equivalent to personal service. 1 Rev. Stat. 1855, p. 885, sec. 1; Gen. Stat. 1865, p. 402, sec. 3; Laws 1869, p. 38, sec. 31.

This law is still retained in the present revision. 2 Rev. Stat. 1879, sec. 6013. Section 22, chapter 34, of the revision of 1855, which subsequently, by being blended with section 1 of the law of 1859 (*supra*), became section 17, of chapter 62, of the revision of 1865, and is now section 742 of the chapter entitled Corporations in the present revision, except that portion of section 17 relating to railroad companies, which portion was amended by the act of 1877, is now section 3497 of the existing laws, and is in the same article, that relating to practice, as section 3489, *supra*. The fourth subdivision of the last mentioned section was enacted by the legislature, as already seen, two years after having placed foreign railroad companies operating roads whose *termini* are opposite to any point in this State, and having offices or places of business in this State, on the same footing as domestic railroad corporations, and many years after foreign insurance companies, by repeated enactments and repeated revisions thereof, had been put, as to service of process, on the same plane as similar corporations chartered by the laws of this State. The question then recurs, what object had the legislature in view in adding to section 3489, the subdivision aforesaid? Certainly, not to obtain personal service or its equivalent on foreign railroad and foreign insurance corporations—for that end had been already accomplished; I can conceive of no other object and no other intention actuating the legislature, but a desire to render the service of a

summons on all foreign corporations, as facile and effective as it already was on individuals, domestic corporations, two classes of foreign corporations, and upon joint stock companies. Sec. 3498. The history of legislation in this State, which I have given, fully supports, and is in accord with, this view. Thus we have in 1855 a law allowing service by summons on all domestic corporations, a law authorizing similar service on foreign insurance companies, and a law authorizing any other foreign corporation having property in the State to be sued by attachment, or as non-resident individuals are sued. Then, in 1859, a law is enacted allowing foreign railroad companies whose chief office, etc., is in the City of St. Louis, to be served with summons as are domestic corporations. Then, in 1877, we have a law amendatory of the last one, and making service by summons valid on all foreign railroad corporations, etc., having offices or places of business in this State.

Then, in 1879, when a revision of all the laws occurs, the legislation which had supplied defects in the statute, so far as pointed out by the judiciary, culminated in the enactment of the clause being discussed, whereby all foreign corporations having an office and doing business in this State, or an agent or employee, are made suable in precisely the same manner as any other defendant by the delivery of a copy of the writ and petition.

If it be said that this view of the clause in question is incorrect, because it renders nugatory and meaningless the act of 1877 (sec. 3497, *supra*) relating to foreign railroad corporations, the reply is that it is by no means of infrequent occurrence that sections of the statute that have long since outlived their usefulness, the purpose of their enactment, are, by some oversight, allowed to encumber our statute book. Thus, though the right of entry has long since become obsolete and useless, each succeeding revision keeps it among our laws. Ferguson v. Bartholomew, 67 Mo. 212. Nor can I regard the clause in question as amendatory to section 742. That section is in, and of itself, complete, and relates to an entirely different class of cases; relates to those foreign corporations, whether railroad, insurance, manufacturing or what not, that have no office or place of business in this State, so that service of summons can be had on them; but yet having property in this State, suit under that section can be brought against them by attachment, or *in rem*, just as it can against individuals. Nor can the view I here advance, respecting the clause in question, be gainsayed in consequence of such clause not prescribing the effect of the service of the process it specifies, since such effect had been designated by the other sections of the same chapter as to individual defendants, and the clause in question treats defendant corporations in the same way. Besides, the right to serve a summons presupposes its lawful issuance; and the legislature having provided that all foreign corporations and joint-stock companies having an office or doing business in this State might be served with process by delivering a copy of the petition and writ, it is to be presumed that the legislature intended that the ordinary consequences should attend such service. Especially should this presumption obtain after this court, in Farnsworth v. Railroad, *supra*, had declared that a provision for similar service, on a foreign railroad corporation having its chief office or place of business in this State, was equivalent to ordinary personal service, and exempted such corporation from the extraordinary process of attachment.

Nor will it do to say that the method of service under discussion was intended as merely constructive service, substitutionary of that by publication. What warrant is there for such assertion? It is surely not found either in the language employed nor in the context, the contiguous members of the same section. Why, then, overlook the plain and natural import of the terms used? Why cast about to see if that language which, employed in the same section as to individuals, means personal service, or its equivalent, may not, by some far-fetched and forced construction, be construed to mean publication when applied to corporations?

Let us for the sake of illustration adopt for the nonce the correctness of the theory, that service on a corporation is to have barely the effect of publication, and note the result. In every suit commenced by attachment the writ contains a clause of summons. 1 Rev. Stat. 1879, sec. 415. An action is commenced by attachment against a foreign manufacturing corporation, having property in this State, and having an office or doing business in this State, and an agent or employee. The officer, as in duty bound, delivers a copy of the petition and writ to the agent as an ordinary summons. Ib., sec. 420. The officer then makes his return as follows:

State of Missouri, } ss.
County of ——— }

Executed the within writ of attachment in the county aforesaid on the ——— day of ———, 1881, by attaching the following described property as that of the defendants, to-wit: (describing it) and by deliveriug to A B, agent of the within named defendant, at the office of said defendant, a copy of the within writ and petition. I further certify that the defendant is not to be found in my said county.

C. D., Sheriff.

Would not such a return amount to a contradiction in terms? Can a defendant be "found" for one purpose, and be *non est* as to another? But if this return is legal and proper, what occurs next? The sheriff makes return that the defendant can not be found, and thereupon the court, acting conformably with section 3496, in such cases made and provided, orders the publication be made, agreeably to section 3494. So that, if the fourth clause aforesaid, indeed and in truth "can have no more operation than as a substitute

for constructive notice in a proceeding against a non-resident individual," this will result in a manufacturing company being served with constructive process twice; once by the method prescribed by the fourth clause, and again by that prescribed by section 3494. And the consequences would not be different, were the proceeding one *in rem*, instead of by attachment.

The illustration I have just employed, as I think, shows, and conclusively shows that the "constructive notice" theory above mentioned is wholly inapplicable to the fourth clause aforesaid; wholly inapplicable for the palpable reason that if that clause is regarded as a mere substitute for service by publication, as has been asserted, then section 3494 relating thereto, and providing therefor, "would have been rendered useless;" for why provide two methods of publication when already possessed of one applicable to all non-residents? Why provide another which, when employed, does not, as has been shown, even possess the poor merit of being constructive notice, but only lays a basis and paves the way for constructive notice, as provided in section 3494, *supra*.

Can it be possible that the legislature intended any such anomalous and useless result to flow from and follow the operation of the fourth clause? It is impossible to believe this was intended. If it was, then such a construction of the fourth clause, while it does not construe the statute "to mean nothing" in fact, does so in effect; for while service of process under it is valid for some purpose, that purpose is itself invalid, as when the service is had with all the formality known to the law, its efficacy is no greater than would be an allegation in a petition or an affidavit of non-residency, as required by section 3494, *supra*. For the reasons aforesaid, I am of opinion that the clause before us was improperly construed by the circuit court.

II. Counsel have made reference to the act of March 26th, 1881, which is as follows: * * *

This act is a declaratory act (Sedgwick on Stats. p. 29), and was passed twenty-five days after the delivery of the opinion of the St. Louis Court of Appeals; but the act can be of no assistance to us so far as concerns the present case, because legislative action can not be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made. This would be to install the legislature in the place of the judiciary, with the power to revise and overturn the solemn adjudications of the latter—a thing not to be tolerated. Cooley Const. Lim., pp. 93, 94 and cases cited. Such action, however, of the legislature, though retrospectively void, is held valid as to future cases. Id. pp. 94, 75, and cases cited. But, as heretofore seen, no such legislative aid was necessary, as the clause we have discussed, in plain, simple and direct terms, declared the legislative intention and will.

III. There is only the further point to be discussed, which is the power of the legislature to authorize such service to be the basis for a judgment *in personam*.

Reliance is placed by the defendant on Latimer v. Railroad, 43 Mo. 105. An examination of that case, however, will show it to differ widely from this one, both in facts and statutory provisions. That suit was brought on a judgment rendered in the State of New York, against a corporation, based upon service had on a director, temporarily present in the city of New York, when the corporation had no office in that State, and section 134 of the laws required such service on the foreign corporation to be made "personally upon the president, treasury or secretary thereof." In such circumstanees this court very properly held that no jurisdiction over the corporation was acquired, and that the judgment was a nullity. That decision was based on Hurbert v. Insurance Co., 4 How. Pr. 275; Brewster v. Railroad, 5 Ib. 183, and Bates v. Railroad, 13 Ib. 576, which construed the law of 1849. Subsequently the law of that State was changed, and the act of 1855 was passed, chap. 269, which contained similar provisions to our present provisions as to service on foreign insurance companies. The effect of the law was considered by the Court of Appeals in Gibbs v. Insurance Co., 63 N. Y. 114, in a most elaborate and exhaustive manner, embracing a history of legislation in that State, as well as the examination of numerous authorities, and the conclusion reached that the statute authorizing personal service and a personal judgment against a foreign insurance corporation was valid to all intents and purposes. And in this State it was held that a foreign insurance corporation, having an agent appointed by it as required by the act of December 8, 1855, should be regarded as a domestic corporation (1 Rev. Stat., sec. 1), might be garnished and a general judgmeht rendered against such corporation, Napton, J., remarking: "Such agents do, in fact, represent the corporation here, although, in the foreign country where the corporation has been chartered, and its chief place of business is, there is another chief officer of such corporation." McAllister v. Insurance Co., 28 Mo. 214. In Farnsworth v. Railroad, Robb v. Railroad, and Middough v. Railroad, 51 Mo. 220, *supra*, a foreign railroad corporation, having its chief office in St. Louis, was held amenable to general process and a general judgment in like manner as a domestic corporation. Now, if it be competent for the legislature to designate in one instance the officer on whom process may be served, assuredly it is competent in all instances where the corporation has an office and does business in this State. It is true that a corporation can not migrate; can not change its place of residence; nevertheless it may transact business; it may incur liabilities; it may sue and be sued in a jurisdiction other than that in which it is chartered. When it goes into another State and engages in the transaction of business, it goes there with the consent, either expressed or implied, of such

State; it goes there in presumed assent and submission to the laws of that State, which provide for the service of process upon such corporation. A very strong case on this point is that of Insurance Co. v. French, 18 How. 404. The State of Indiana had chartered an insurance company, whose principal office was at Lafayette in that State. The State of Ohio passed a law providing that foreign insurance companies might do business in that State, upon condition of appointing an agent upon whom process could be served. The corporation established an office at Cincinnati, was served with process delivered to its agent, and judgment rendered. Afterwards, suit was brought in Indiana, on the judgment thus recovered; and upon objection being made that the Ohio court had no jurisdiction over the person sued; that the corporation, being created by a law of Indiana, could have no existence out of that State, and consequently could not be sued in Ohio; but the Supreme Court of the United States ruled that the judgment was as valid, entitled to the same faith and credit under the Constitution and laws of the United States, as though rendered in the State where the corporation had its *habitat*.

In Railroad Co. v. Harris, 12 Wall. 65, Harris brought suit in the District Court of Columbia for injuries received. The corporation was chartered by the State of Maryland. The provision of law at the time suit was brought, defining the jurisdiction of the circuit court of the District, was the act of Congress providing: "That no action or suit shall be brought before said court by any original process against any person who shall not be an inhabitant of, or found within said district at the time of serving the writ;" and the declaration did not charge the company with being a citizen, resident or inhabitant of the district, "but a corporation * * * * possessing a legal and recognized existence within the limits of the District of Columbia, and exercising therein corporate powers, rights and privileges in the making of contracts," etc. The company pleaded in abatement that it was not an inhabitant of, and not found in the district where the writ was served. But the suit was held properly brought and the service properly made, the court, among other things, remarking: "A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts, not *ultra vires*, which a natural person could do. The chief point of difference between the natural and artificial person is, that the former may do whatever is not forbidden by law; the latter can only do what is authorized by its charter. It can not migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly," and the company was held as "liable to suit where the suit was brought in all respects as if it had been an independent corporation of the same locality." Similar enunciations were made in *Ex parte* Schollenberger, 96 U. S. 369, and the foregoing decisions approved.

New Jersey has a statute essentially the same as the one we have been discussing, and there it is held that a general judgment may be rendered against a foreign corporation sued under the statutory provisions.

In Georgia, the Hartford Insurance Company was sued, and pleaded to the jurisdiction on the ground of being a resident of the State of Connecticut; and on the ground of not having been served with process. But the court said: "The only difficulty in the way is a practical one. By the common law, process against a corporation must be served upon its president or principal officer. Angel & Ames, sec. 404. * * * * Nor is it in any inherent, fundamental quality in a corporation, that process against it should be served upon its principal officer. It is mere matter of municipal law that the State may change at pleasure. We grant to these foreign corporations the right to do business here. We permit them to open offices here. We protect them in the property they hold here. We open our courts to them for the enforcement of the claims they have upon our citizens. Is it hard, or a violation of principle, that they should be put on the same footing, as to actions against them, as our own corporations?" Insurance Co. v. Carrugi, 41 Ga. 660. The other cases cited by plaintiff fully support the position that a foreign corporation, having agents and doing business in another State, is suable in the latter locality by such process served upon such agent of the corporation as such State may prescribe. If the law were not so; if it were out of the power of the legislature to provide suitable process, whereby foreign corporations having offices and agents and doing business in this State could be successfully sued in ordinary actions like our own corporations are sued, the result would be in many instances a substantial denial of justice. Denied in our own courts the privilege of suing such corporations, our citizens would either have to resort to distant foreign tribunals for redress, or else to abandon all hope of recovery, because the cost of the remedy would far exceed the value of the redress to be obtained, and frequently no relief could be afforded by the foreign courts, because of the action being grounded on some local law peculiar to this State. Neither reason nor authority will uphold such an anomalous view. The judgment of the St. Louis Court of Appeals, as well as that of the circuit court, are reversed, and the cause remanded, in order that this cause may be proceeded with in conformity hereto.

All concur.

WEEKLY DIGEST OF RECENT CASES.

ADMINISTRATION — DEBTS OF DECEDENT — LIEN UPON HIS LANDS.

The debts of a decedent continue a lien on his lands in the hands of his widow and heirs, only for ten years without an action therefor having been commenced against them, when the debts were not secured by mortgage or judgment in the lifetime of the debtor. *Hope v. Marshall*, S. C. Pa.

ADMIRALTY—JURISDICTION—PILOTAGE FEES.

It has long been settled that claims for pilotage fees are within the jurisdiction of admiralty. *Ex parte Hagar*, U. S. S. C., Oct. T., 1881.

ADMIRALTY.

See Death by Wrongful Act.

AGENCY — BROKER ASSUMING TO ACT FOR BOTH PARTIES.

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, *prima facie*, inconsistent duties: and he can not recover compensation from either party, even upon an express promise, until it is clearly shown, that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from each party. *Bell v. McConnell*, S. C. Ohio, Dec. 13, 1881.

BAIL-BOND—SURETIES.

Fears of the accused for his personal safety will not excuse his failure to appear to as to release the sureties on his bail-bond unless it appear that application was made to the proper authorities for protection, and that they were unable or unwilling to extend the necessary protection to the accused to enable him to appear. *Weddington v. Commonwealth*, Ky. Ct. App.. Dec. 8, 1881.

CONTRACT—AGREEMENT FOR BENEFIT OF THIRD PARTY.

Where two men agree that each will loan a third a sum of money, one keeps and the other breaks his promise, the lender can not compel the other promisor as garnishee in an execution attachment, to pay to him what he had promised to loan said third person. *Nellis v. Coleman*, S. C. Pa., Oct. 31, 1881.

CONTRACT—WHAT CONSTITUTES A FORGERY—IMPERSONATION OF ANOTHER.

A, having the same names, occupation and description as his deceased father, surreptitiously obtained possession of the title deeds to certain freehold and leasehold property of his father (to a certain share only in which he was himself entitled); and, without the knowledge of the other persons interested in the property, executed a mortgage of it, under circumstances which led the court to consider that he was personating his father throughout the transaction. *Held*, that, as against the other persons interested in the property, the mortgages must be declared void, and the title deeds must be handed up to them. *Cooper v. Vesey*, Eng. High Ct., Ch. Div., Nov. 30, 1881.

CONVEYANCES—REPRESENTATIONS BY THE GRANTOR.

Where the mortgagor makes no representations, the mortgagee is presumed to have examined the records for himself; but if he does make such representations, the mortgagee may rely upon such representations, and if they are not true, he is entitled to be relieved from the consequences of such mistake. *Farmers', etc. Ins. Co. v. German Ins. Co.*, Ky. Ct. App., Dec. 13, 1881.

CRIMINAL LAW—ARSON—BURNING BARN.

The malicious setting fire to a barn belonging to a dwelling-house, so situated that its destruction by fire would endanger the dwelling-house, constitutes felonious arson under the 137th section of the Penal Code (P. L. 1860, 415), although the barn was not adjoining nor parcel of the dwelling house, and the latter was not in fact burned. *Hill v. Commonwealth*, S. C. Pa., May 31, 1881.

CRIMINAL LAW—FORMER JEOPARDY.

No person shall be twice put in jeopardy for the same act or omission whether the offense be the same, *eo nomine* or not. *Harshfield v. State*, Tex. Ct. App., Dec. 3, 1881.

DEATH BY WRONGFUL ACT—JURISDICTION OF THE UNITED STATES DISTRICT COURT.

A district court of the United States having jurisdiction of the vessel and of the collision, may, sitting as a court of admiralty, try the question of the liability of the vessel for damages for the death of persons killed in such collision. *Ex parte Gordon*; *Ex parte Detroit River Ferry Co.*, U. S. S. C., Oct. Term, 1881.

EQUITY—RELIEF FROM MISTAKE.

Equity in granting relief upon the ground of mistake will restore the parties to their former condition, when it can be done without interfering with any new right acquired on the faith of the altered condition of their legal rights, and without doing injustice to other persons. *Farmers', etc. Ins. Co. v. German Ins. Co.*, Ky. Ct. App., Dec. 13, 1881.

FACTOR—POWER—PLEDGE OF PRINCIPAL'S GOODS.

To pledge the goods of the principle is beyond the scope of the factor's power, and any attempt to do it under color of sale, is tortious and void. *McCreary v. Gains*, S. C. Tex., Dec. 16, 1881.

INSURANCE—LIFE—POLICY FOR THE USE OF THE WIFE.

A life policy which, as originally issued, was declared to be for the use of the wife of the insured, is not changed in its character by being afterward changed to a "paid up" policy; and being non-assignable under the laws of the State during the life of the insured, any transfer of the widow's interest in it, though made in another State, could not be deemed valid here. *Mut. Life Ins. Co. v. Terry*, N. Y. S. C.

MORTGAGE—RELEASE UNDER MISTAKE OF FACT.

Where the first mortgagee releases his lien, and accepts a new mortgage without knowing of the existence of the second mortgage, the second mortgagee will not be allowed to avail himself of the advantage thus gained. *Farmers', etc. Ins. Co. v. German Ins. Co.*, Ky. Ct. App., Dec. 13, 1881.

NEGLIGENCE—EMPLOYER AND CONTRACTOR—INDEPENDENT EMPLOYMENT.

Where an injury results from the negligent acts of a contractor, exercising an independent employment, not under the control of the party employing him, the employer is not liable to the person injured. *School District v. Fuers*, S. C. Pa., Oct. 18, 1881.

NEGLIGENCE—INJURY TO EMPLOYEE.

Plaintiff, having been at divers times employed by the defendant as a detective in cases of property

stolen from its cars, was requested by defendant's agent, duly authorized for that purpose, to go from one station on defendant's road to another, to aid in discovering persons who had stolen property from defendant's cars at the latter station; and the means of conveyance furnished by defendant was a hand car. *Held*, that defendant was liable for any injury to plaintiff while riding upon said car, caused either by the unfitness of such means of conveyance or by any negligence of defendant's servants in running the same, or by carelessly running it at a dangerous rate of speed. *Pool v. Chicago, etc. R. Co.*, S. C. Wis., Dec. 13, 1881.

NEGOTIABLE PAPER—PAROL EVIDENCE.

As between the parties to negotiable paper, parol evidence is admissible to show the true relations of the parties, where the law would presume from the facts a different relation. *Graves v. Johnson*, S. C. Errors, Conn.

NOTICE—CONTENTS OF WILL OR DEED.

Although parties may, in fact, have had no knowledge of the contents of a will and deeds through which they derive title, they are charged with notice just as if they had actually inspected them. *Gaston v. Morrow*, S. C. Tex. Dec. 20, 1881.

PARTNERSHIP—DIOLISUTSON—SALE OF INTEREST.

When one partner sells out his interest to his copartner in consideration in part, that the remaining partner shall pay all the debts of the concern, with the knowledge of the creditor, the outgoing partner as to such creditor, remains a mere surety for the debt. *Brill v. Hoile*, S. C. Wis.

PRACTICE—JUDGMENT—FINDING OF COURT SITTING AS JURY.

The judgment of the court below, sitting as a jury, is conclusive, and will not be disturbed unless it is against the evidence or without any evidence to support it. *Ross v. Hogan*, Com. of App. S. C. Tex., Nov. 1, 1881.

STATUTE OF FRAUDS—CONTRACT PARTIALLY EXECUTED.

A partially executed contract can not be revoked as to what has been done under it, though it be within the statute of frauds. *Sovereign v. Ortman*, S. C. Mich., Oct., 1881.

STATUTE OF FRAUDS—CONTRACT FOR BENEFIT OF ANOTHER.

An agreement to execute a note as surety for another, is within the statute of frauds, and to be valid must be in writing. *Dee v. Downs*, S. C. Iowa, Dec. 20, 1881.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

4. *a*, A citizen of Missouri, owning in fee and occupying as a homestead in this State, a tract of 240 acres, died in 1874, while the homestead law of 1865 was in force. He left a widow, but no children or their descendants. By his last will, after providing for the payment of his debts, he provides as follows: "It is my will that my wife Sarah, have all the remainder of my property, both real and personal, to use and dispose of as she pleases until her death, and then the remainder to go to my next legal heirs." She died in a few days after he died, knowing the contents of the will and supposing that it passed a fee-simple title in all the land to her. By her last will she devises the 160 acres of the tract on which the house stood to certain parties, and the remaining 80 acres (which corners with the 160 acres) to certain other parties. Her devisees, after her death, had both wills probated and respectively instituted suits in ejectment against the representative of the husband's heirs, who was in possesssion and was defeated. The suits were based on the theory that the husband's will vested a fee-simple title in his wife. First. Did the will vest title in wife in fee, or only a life estate, with a power of disposing of it in fee? *b*. If the latter, was a conveyance by will a proper execution of the power? *c*. If her interest under the will terminated at her death, had she any interest in fee under the homestead law? *d*. Where is the title?

Paris, Mo. T. B. R.

5. A died intestate in 1866. In 1869 a certain piece of real estate belonging to A was sold for taxes. A had three children, born respectively, 1854, 1859, 1861. Can those barred by the Statute of Limitations quitclaim to the latter, and he maintain an action for possession, quieting of title? Cite authorities. G. C.

La Fayette, Ind.

QUERIES ANSWERED.

Query 63. [13 Cent. L. J. 498.] A buys personal property of B for $200, paying $100 in cash, and giving a sixty-days note for the amount of the balance. Delivery is made to him at the time of sale. He then gives a chattel mortgage on the goods to C, which is duly filed in the town where A has the property in possession. A borrows heavily, and then runs away. The mortgagee takes possession by virtue of the power given him in the mortgage, and creditors get out attachments against the property, and levy is made. The mortgagee and constable who makes the levy leave the property with D. B then brings an action of replevin, and makes D the defendant, giving a bond to him only. Can B recover the whole, or any part of the property, on a plea that the sale was conditional—title to remain in him until fully paid for? How much credit should be given to the plea of a conditional sale under such circumstances? Would an innocent purchaser be protected against the claim of B? Give authorities.

Peekskill, N. Y. E. B. T.

Answer No. 2. How much credit would be given to the plea of conditional sale, would depend upon how much of the evidence given in its support the jury believed. Questions of fact must be relegated to the trial court. The only answer which can be made to E. B. T. is, that, in his State, and most others, if the sale is conditional, *e. g.*, that the title is to remain in the vendor until the price is paid, no interest passes to the vendor which he can sell or mortgage, or which can be taken on execution against him as against the vendor, and the *bona fides* of the purchaser from such vendee does not help him. 40 N. Y. 314; 23 Hun, 513; 46 N. Y. 500; 19 Hun, 181; 62 N. Y. 1; 2 T & C. 284. But it would be otherwise, if the goods were sold to be paid for on delivery, and were delivered without payment, and the condition was attached. 77 N. Y. 391. For the cases in other States, see Aultman v. Mallory, 5 Neb. 178; Cole v. Perry, 13 Vroom. (N. J.)

308; s. c., 36 Am. 511; Goodell v. Fairbrother, 12 R. I, 233; s. c., 34 Am. 631; 1 Chitty on Cont., 528, notes (11th Am. ed.), where most of the authorities are cited. D. L. A.

Sherburne, N. Y.

Answer No. 3. B can not recover against D, as the possession of the latter is that of his principal, the mortgagee, who is protected by his mortgage, if it was accepted by him in good faith. The delivery of the property to A gave him such a title as he could pass by sale or mortgage. "The delivery of personal property, under a contract of sale, by an unpaid vendor to the vendee, passes the title so far that an innocent purchaser from the latter will be protected, irrespective of the contract or the intention of the parties." 68 Ill. 553. The mortgagee, C, would be regarded as an innocent purchaser. See, also, 65 Ill. 197; 46 Ill. 487; 49 Ill. 458, and cases there cited.

Springfield, Ill. R. WOLCOTT.

Query 62. [13 Cent. L. J. 498.] A negro man and woman, A and , being slaves, were, by consent of their masters, and according to the custom then prevailing among that race, married, and lived together until separated by the will of their masters. From this marriage two children were born. After emancipation A married C and died intestate, leaving no children by C. Can the children by first marriage claim an interest in A's estate as against C, the law in Mississippi being that, on the death of a husband without legitimate children, his wife inherits all his estate? The question is simply, Are the children of A and B bastards?

Coffeeville, Miss. R. R.

Answer. The *status* of the children of the ex-slaves depends upon the law in force at the time of their parents' marriage. If the common law was in force, a simple consent made a good marriage. See Blackstone's remarks on the contract. Many State statutes requiring license, registration or consent of parents, are merely regulative, and do not affect the validity even of a private marriage, where the parties themselves officiato, without witnesses. In such cases it becomes a matter of evidence. But in Mississippi there may have been some law founding validity on obedience to statute. In pension matters the United States Statutes are very liberal, cohabitation being evidence of marriage between former slaves, and some States have similar laws. FRANCIS H. SHEPPARD.

Springfield, Mo.

CORRESPONDENCE.

Editor Central Law Journal:

The answer published in your issue of Dec. 2, 1881, to query 53, did not satisfy me; and on examining two of the authorities cited in the answer (25 Ohio St. 162, and 2 Bish. Crim. Procd., sec. 326—the only citations I could readily verify), the result was still less satisfactory. Bishop, in the section above cited, seems to consider the English cases sufficiently in point on the question of venue, and cites, among others, Regina v. Rogers, and that case is thus given in Jacob's Fisher's Digest, 3173: "A traveler employed to collect money in the country, and remit it at once to his employers in Middlesex, collected money in Yorkshire, appropriated it there, and rendered false accounts to his employers by post. *Held* that he was rightly convicted of embezzlement in Middlesex." The same Digest, 3172, gives the case of Reg. v. Murdock, to the same effect; but in that case the report says the defendant, "having appropriated them (the two sums of money) to his own use, neglected to return and account to his master for the money;" and having afterward been met by his master in Nottingham, where the defendant should have accounted for the moneys, his master living there, and the money having been collected in Derbyshire, "upon being asked by him respecting the two sums of money, said he was sorry for what he had done—that he had spent the money. Held, that there was evidence to go to the jury of an embezzlement in Nottingham, and that the prisoner was rightly tried there." If these cases apply (as Bishop thinks, one does), why would not Lucas County, Ohio, courts have jurisdiction of the offense described in query 53?

N. HODGE.

Akron, Ohio.

LEGAL EXTRACTS.

GUITEAU UNDER CROSS-EXAMINATION.

Judge Porter's cross-examination of Guiteau shows a masterly hand in dealing with an unprecedented case. It is an admirable example of the true ideal of a cross-examination, directed not to browbeating and confusing the witness, but simply to drawing him fairly out and making him display himself in his own colors. This is the highest art of effective cross-examination. To confuse and disconcert a witness often raises sympathy for him with the jury; to make him manifest himself freely and truly is far more difficult. By this examination Guiteau has distinctly set forth that he knew the act was unlawful and criminal; that it was punishable; that he was likely to be punished for committing it unless he could justify himself; that part of his motive was the sale of his book; that he feared the indignation of the community; that he appreciated and desired the protection which the law extends to a criminal, and that he felt remorse. The courteous manner—without attack, menace or browbeating—in which the examiner pierced the shield which Guiteau held before him, and led him to give these glimpses into his inner consciousness, purpose and feeling, are all worthy of careful study. Upon the facts that have been thus gathered, the experts may intelligently proceed to give us the best light which science can throw upon the most important phase of insanity which has yet been presented in our courts. The wisdom of the course of Judge Cox in forbearing while the prisoner was so unruly is well vindicated by the result of the prisoner's testimony.—*New York Daily Register.*

NOTES.

——In one of the justice's courts the other day, in a suit of malicious trespass in entering upon land and removing a fence, one of the witnesses was asked: "Did you help build that fence?" "I did." "What year was it?" "Well, let's see. It was the same year my brother-in-law had his leg broke in a wrestling match at Dearborn." "Well, what year was that?" "Let's see! It was just six months after we found the Duggan boy drowned in Sabin's well. That was—that was in eighteen hundred and—an——" "Can't you remember?" "Why, yes; I ought to. Let's see. That same summer that we took the Duggan boy out of the well, Tyler's second girl started to run away with a tin peddler, and we caught them just the other side of Dearborn. I squared off on the peddler and knocked him eighteen feet into the bushes." "But what year was it that you built the fence?" "Why, the same year that all this happened, or maybe a year before or after. If I could only talk with my old woman a minute I could get it exact." "How?" "Why, I was building the last half of that fence when she was hooked by a cow, and she'd hunt up the man who owned the beast and hit the date square in the head." It was decided to let the exact date remain in seclusion.—*Detroit Free Press.*

——"What! can a man be imprisoned for debt in this State?" "Yes, sir, he can for one kind of debt; that is on what the lawyers call a tortious obligation." "How is that?" "Well, take the case just called before Judge Cameron, for instance: Math Nowak, of the town of Washington, living on what is called Bohemian Ridge, thought that his neighbor, Michael Schendel, had built his fence on the highway, and deputized himself to tear it down. Schendel had him arrested on a civil warrant and brought before Justice Steinlein, when a judgment was obtained against him of 50 cents and costs of suit, amounting in all to $14.69. Nowak refused to pay it, thereby throwing the responsibility on the plaintiff Schendel. That constitutes a tortious debt." "Well, how did it come out?" "As soon as it was known that Nowak had made up his mind to evade payment, a warrant was issued for his arrest, and placed in the hands of Constable Scott, who made several attempts to arrest him; but whenever he came in sight of his house, Nowak would get wind of his approach and take to the woods. It afterward appeared that his girl was on watch and gave her father the signal sign of danger by waving a large red handkerchief in a casual manner, at the same time talking to the officer, and pointing out the exact part of the farm on which Nowak was working. Scott finally succeeded in arresting him very early in the morning, and brought him into town and locked him up." "Then did he pay?" "Pay? No. He said he couldn't pay." "What good did it do to lock him up then?" "None whatever. All the time he was in jail Schendel had to pay his board at the rate of $3.50 a week, besides paying the additional costs which have accumulated since the Steinlein judgment." How did Nowak get out of jail? I understand you say that he was released to-day.' "After a man has been in jail ten days he can plead the poor man's act, make out an affidavit that he has no personal property, and can't pay. He is then brought before the proper tribunal. Nowak was brought before Judge Cameron and released upon his affidavit." "What is the entire bill now?" "Something like $50, and Schendel must pay every cent of it. He has nothing to show for it, except the satisfaction of keeping Nowak in jail thirteen days."—*La Crosse Republican.*

——*The New York Daily Register*, in speaking of Judge Porter's argument on the law points in Guiteau's trial, says: "This masterly argument, carried out to its legitimate conclusion, and always aided, by the speaker's readiness, wisdom and skill, instead of marred by the utterances of Guiteau, interlaced its demonstration with his own testimony and responses, and Guiteau himself clinched every nail that the speaker's logic drove. This is an ordeal which perhaps no advocate has before passed through; and the moderation, gravity and propriety, coupled with the spirit of keenness and force, with which the task was accomplished, places Judge Porter clearly at the head of his profession. Here is something we have never before seen, at least in such degree, namely, undisconcertible eloquence."

——Who ever heard of any one being punished for stealing a watermelon? It was tried once in Tennessee, three or four years ago. Good old Judge Frazier, of the Davidson and Rutherford Circuit, was presiding; an unlucky negro was the prisoner; a very young lawyer was defending him; twelve good men and true were in the box. There was no doubt that the prisoner had stolen the melon; the proof against him was as clear as noon-day. The attorney called no witnesses whatever. but simply arose and said: "May it please your honor and gentlemen of the jury, my client is charged with stealing a watermelon. He does not deny it. But this is a new crime for our courts. I have stolen watermelons myself; the chances are that your honor has stolen watermelons; and, gentlemen, I'll agree to set 'em up if there is a man on that jury who hasn't stolen a watermelon!" The judge jerked up his head, took off his spectacles, and looked with a startled but smiling stare upon the young scamp; the jurors nudged each other and snickered; the spectators guffawed; but it is needless to say that the brief argument for the defendant was a successful one with the honest jurymen.